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**LAW AND EQUITY COURT OF THE CITY OF RICHMOND.**

SOL. STEIN *v.* CITY OF RICHMOND, ET ALS.

R. C. STEINER *v.* CITY OF RICHMOND.

**1. Injunction—Jurisdiction—Enforcement of Ordinance.**—Upon a bill in equity for a preliminary injunction restraining the enforcement of an ordinance the only question which the court can consider is the validity of the ordinance. The court can not consider the fact that the complainants do or do not come within the scope of the ordinance or that they will or will not violate it.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 578.]

**2. Injunction—Parties—Who May Enjoin Enforcement of Ordinance.**—Upon a bill in equity for a preliminary injunction restraining the enforcement of an ordinance, the court will presume from the allegations in the bill that the complainants are subject to the provisions of the ordinance and their property interests are affected and that they have a right to invoke the jurisdiction of the court.

**3. Municipal Corporations—Regulation of Transient Retail Business—Public Auctions.**—The ordinance of the City of Richmond of December 16, 1916, regulating transient retail business and public auctions, which requires a license therefor, is not an exercise of the taxing power but of the police power vested in the municipal authorities.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 36.]

**4. Same—Same—Police Regulations.**—The ordinance was enacted under the police power of the city and does not infringe upon any of the rights of a citizen protected by the Constitution of the United States.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 174, 610.]

**5. Constitutional Law—Police Power—Subjects of.**—The police power has in recent years been greatly extended so as to cover not only subjects relating to public safety, health and morals, but also to those relating to the public comfort and even to the convenience of the citizens of the community.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 225, 231.]

**6. Constitutional Law—Police Power—Definition.**—The police power vests in the legislative department of the government to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalty or without, and not repugnant to the Constitution, that the legislature shall judge to be for the good and welfare of the commonwealth and of its citizens.

**7. Municipal Corporations—Powers—Regulation of Transient Retail Business—Public Auctions.**—The City of Richmond has no express

power to regulate the business of transient merchants nor of that class of auctioneers mentioned in the ordinance of December 16, 1916; but such power is impliedly granted by the general welfare clause of its charter.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 167. See 1 Va. Law Reg., N. S., 332.]

**8. Municipal Corporations—Powers—Determination of.**—Municipal corporations are prima facie the sole judges respecting the necessity for and the reasonableness of their ordinances, and every independent is to be made in favor of the validity of such ordinances.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 612.]

**9. Municipal Corporations—Powers—Police Regulation.**—The police power conferred upon the City of Richmond is very broad and comprehensive and, within the limits of the powers conferred, equal to those possessed by the legislature itself.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 174.]

**10. Municipal Corporations—Powers—Regulation of Transient Retail Business—Auctioneers.**—Ordinances regulating transient retail business and public auctions are within those powers of a municipal corporation which should not be interfered with by the courts.

**11. Municipal Corporations—Ordinances—Reasonableness.**—Where an ordinance is enacted under a specific power conferred upon a municipal corporation by the legislature, the reasonableness of the ordinance is entirely committed to the discretion of the municipality and is not subject to review by the courts; but, where the power of the municipal corporation is deduced from general language, the reasonableness of the ordinance is subject to judicial review. While the provisions of the ordinance of December 16, 1916 are to some extent stringent it is not for the court to say whether or not the provisions are essential to the proper regulation of the transient retail business and public auctions and to the protection of the purchasing public.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 611; 15 Va.-W. Va. Enc. Dig. 754.]

#### ON MOTION FOR PRELIMINARY INJUNCTION.

These cases arose under the ordinance of the City of Richmond approved December 16, 1916, to regulate transient retail business and public actions in the City, which provided as follows:

"1. That during the fiscal year 1916, and during each fiscal year thereafter, it shall be unlawful for any person either for himself or for another to conduct a transient retail business or to sell or offer to sell at public auction any stock of merchandise in whole or in part, without first obtaining from the Commissioner of the Revenue of the City of Richmond a license so to do.

"2. That no such license shall be issued for a period of time

exceeding twelve months from the date of issue, and the day and hour of its expiration shall be stated in the license, and before such license shall be issued the applicant therefor shall pay to the City of Richmond the sum of seventy-five dollars (\$75.00). The application for such license shall be in writing and verified by oath of the applicant, and shall state the name of the applicant, residence, street and number of the proposed place of business, and that such place is adequately illuminated in the day time without the aid of artificial light, and shall set forth in detail the goods to be sold and what statements or representations are to be made or advertised as to the same, and the length of time for which the license is desired, and if previously engaged in a like or similar business to designate all the places where the same has been conducted within the preceding twelve months, and shall furnish to the said Commissioner if demanded other evidences as shall be by him deemed necessary to establish the truth of the statements made in the said application.

"3. That no additional license as herein provided shall be required for the sale of any wagon, carriage, automobile, mechanics' tools, used farming implements, live stock, poultry, (dressed or undressed,) sea food, vegetables, fruits, melons, berries, flowers, leaf tobacco, or for the sale of second-hand furniture and household effects, when being sold at the residence of the house-keeper desiring to dispose of the same.

"4. That no person licensed as hereinbefore provided shall sell at auction as herein provided, from the first day of April until the 30th day of September, both inclusive, between the hours of seven o'clock in the evening and eight o'clock the following morning, nor from the first day of October until the 30th day of March, both inclusive, between the hours of six o'clock in the evening and eight o'clock in the morning, any jewelry, diamond or other precious stone, watch, clock, gold and silver ware, gold and silver plated ware, rugs, curtains, carpets tapestries, statuary, porcelains, chinaware, pictures, paintings, bric-a-brac or articles of virtu.

"5. That every person selling or offering for sale property under the provisions of this ordinance shall, in describing the same, be truthful with respect to the kind, quality and description of the same, and which, for the purposes hereof, shall be considered as warranties, and any breach of the same shall be sufficient to vitiate such sale, and the person making such false representation shall be liable to a fine as hereinafter provided.

"6. Any person violating any of the provisions of this ordinance shall be liable to a fine of not less than twenty nor more than two hundred dollars for each offense, or imprisonment for not more than sixty (60) days or both in the discretion of the Police Justice of the City of Richmond.

"7. Nothing herein shall be construed to prohibit the sale of any goods by an assignee, trustee, executor, fiduciary, officer in bankruptcy or other officer appointed by any court of this Commonwealth or of the United States.

"8. This ordinance shall be in force from its passage."

CRUMP, JUDGE: (1.) In those two cases the plaintiffs have filed bills in equity praying for a preliminary injunction restraining the city and its officers from enforcing the provisions of an ordinance approved by the mayor on December 16th, 1916, and alleging that the said ordinance is invalid.

It is well settled that under such circumstances the only question which the court of equity can consider is the validity of the ordinance. If the business conducted by the complainants does not come within the scope or class of occupation regulated by the ordinance, or if the complainants have not or will not violate the ordinance in the pursuit of their business, proof of such facts will constitute a perfect defense at law to any proceeding against them, whether the ordinance be valid or not. On this hearing, therefore, the court is without jurisdiction to consider and decide whether the complainants, or either of them, have violated the ordinance, or whether the business conducted by them respectively comes within the scope of the provisions of the ordinance.

(2.) In order to pass upon the validity of the ordinance, the court will presume from the allegations in the bills of complaint that the complainants and the business conducted by them are subject to the provisions of the ordinance and that, therefore, their property interests are affected and they have a right to invoke the jurisdiction of the equity forum for their protection.

(3.) The ordinance in question forbids anyone, without first obtaining a license, "to conduct a transient retail business or to sell or offer to sell at public auction any stock of merchandise in whole or in part." An annual license of seventy-five dollars (\$75.) is required. Written application for such license must be made and is required to contain information in detail. The sale of wagons, automobiles, farming implements, live stock and some other merchandise is excepted from the provisions of the ordinance. Sales, under the license, are forbidden in the summer months except between the hours of eight o'clock in the morning and seven o'clock in the evening, and in the winter months between eight o'clock in the morning and six o'clock in the evening, as to jewelry, diamonds and some other named articles of value. Any person selling property under a license issued by virtue of the provisions of the ordinance is required to be truthful in his statements with reference to the article sold and any false statement is made punishable by fine. A fine of not less than twenty dollars (\$20.) nor more than two hundred

dollars (\$200.), or imprisonment for not more than sixty (60) days is declared in the ordinance for a violation of any of its provisions.

(4, 5.) In the first place it is clear that this ordinance does not infringe upon any of the rights, of a citizen, protected by the constitution of the United States. The ordinance is manifestly not an exercise of the taxing power, but is enacted under the police power vested in the municipal authorities. If the ordinance is within the extent of the police power conferred upon the city, and is a reasonable exercise of that power, it cannot be said to be in conflict with any of the provisions of the United States constitution. The police power has of recent years been greatly extended so that, in modern times, it has been made to cover not only subjects relating to the public safety, health and morals, but also those relating to the public comfort and even to the convenience of the citizens of a community. The most recent decisions of the Supreme Court of the United States are in *Tanner v. Little*, 240 U. S. 369; *Rast v. Van Deman & Lewis Co.*, 840 U. S. 342; *Brazee v. People*, 241 U. S. 34.

The question to be decided, therefore, is whether the City of Richmond, under its Charter and the general laws, has the authority to enact regulations of this character; and if it has the power to put into effect the ordinance in question, and so to regulate in the exercise of the police power the subjects mentioned in the ordinance, whether the ordinance is in its provisions a reasonable exercise of the police power.

(6.) The police power is difficult to define, but it may be said in general terms to be the power vested in the legislative department of the government to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalty or without, and not repugnant to the constitution, that the legislature shall judge to be for the good and welfare of the Commonwealth and of its citizens.

(7.) I do not find that a specific power is given the City of Richmond to regulate the business of transient merchants and that character of auction business mentioned in the ordinance. The power, therefore, if conferred upon the city, must be deduced from the language either in the Charter or in the general laws conferring upon the city power to enact ordinances for the general welfare and benefit of the municipal community. The statutes bearing upon this matter are to be found in § 1038 and § 1042 of the Code of Virginia and in § 19 of the Charter of the City of Richmond. The said § 19 of the Charter confers general power upon the city in these matters, as follows: "The council of the City of Richmond shall have power to enact suitable ordinances to secure and promote the general welfare of the inhabitants of the city, by them deemed proper for the safety,

health, peace, good order and morals of the community." This is what is usually termed the general welfare clause.

In 3 McQuillin Municipal Corporations, the powers conferred upon cities by such a clause as that quoted above are considered and summed up as follows: "In brief, under this general grant of power ordinances may be passed which are necessary and beneficial and they will be adjudged valid by the courts provided they are necessary and consonant with the general powers and purposes of the local corporation and not inconsistent with the law and policy of the state." And at the end of § 977 in the same volume Mr. McQuillin says: "Property rights cannot be destroyed or unduly restricted in the exercise of the police power. As we have seen, certain occupations and practices may be forbidden, others may be regulated. Those which are dangerous, or of such a character they may be so conducted as to affect the health, safety, morals and general welfare of the community, may be regulated and the extent and reasonableness of the regulations must be determined by the inherent nature of the trade or occupation. Although the trade or occupation may be innocent and innocuous and may be said to be pursued as of right as distinguished from a mere privilege, the police power as regarded and enforced by the sounder of judicial opinions is sufficiently broad to justify reasonable regulation when deemed necessary or desirable for the public good." In *Re Montgomery*, 163 Cal. 457.

What business is to be regulated and what regulations are necessary, reasonable or desirable for the public good is, in the first place, for the legislative department of the government to decide in its discretion, and the courts are reluctant to interfere with the judgment of the legislative department in such matters.

(8, 9.) Under the Charter of the City of Richmond the law making power is vested in the City Council. In the case of *Elsner Bros. v. Hawkins*, 115 Va. 47, the court held that an ordinance of the City of Richmond forbidding pawnbrokers to receive as security or pledge, or to purchase, pistols and other weapons was a valid exercise of the police power. That ordinance related so directly to the public safety as to make the decision in the case by no means controlling in the present case. But, in deciding the case, the court held that municipal corporations are *prima facie* the sole judges respecting the necessity for and the reasonableness of their ordinances; that every intendment is to be made in favor of the validity of the exercise of the municipal power and it is not the province of the courts, except in clear cases, to interfere with the exercise of that power. Referring to the Charter of the City of Richmond, the court designated the police powers conferred upon the city as very broad and comprehensive and declared that the police powers delegated to the city

are, within the limits of the powers conferred, quite equal to those possessed by the legislature itself.

The decisions of other states show that in recent times the business of a transient merchant has been found to be such as to require, in the judgment of the authorities of some of the cities, regulation by the municipal authorities. The business of auctioneers has been always considered to be subject to classification and regulation by the municipal authorities. As to these matters the following authorities may be consulted: *In re Haskell*, 112 Cal. 412; *People v. Jenkins*, 202 N. Y. 53 also reported in 35 L. R. A. (N. S.) 1079, where it is annotated; *Minnesota v. Martin*, 124 Minn. 498, also reported in 51 L. R. A. (N. S.) 40, where it is annotated.

In the case referred to from New York a license fee of one hundred dollars (\$100.) a month was imposed upon transient merchants selling bankrupt or damaged stocks. This ordinance was declared invalid because the fee of one hundred dollars (\$100.) a month was evidently not sustainable under the police power and was an unfair exercise of the taxing power given to the municipality, as the ordinance, which occurred in the general statute, applied only to towns and small cities. In the course of its opinion the court said: "If the statute provided that the transient trader should as a condition of obtaining the license make proof to the local authorities that the facts stated as to his stock of goods were true and thereupon be subjected to a reasonable license fee covering the expense to which the municipality had been put the statute would be upheld." That is, the court says that such a statute or ordinance would be a valid exercise of the police power.

In *State v. Parr*, 109 Minn. 147, a statute having for its object the regulation of hawkers, peddlers and transient merchants was declared unconstitutional because of discriminating territorial classification. In the course of its opinion the court says: "Permanent merchants are those who have a permanent place of business, and transient merchants are transitory or temporary traders who have no intention of locating permanently. This distinction is marked, and is determined by the manner in which the selling of goods is conducted. It is a matter of common knowledge that the practice of opening a temporary place of business for the purpose of selling goods under the excitement created by extraordinary advertising naturally tends to induce the ignorant and unwary to purchase goods of a questionable character and at exorbitant prices. That there should be some reasonable regulation of this sort of traffic has now become well recognized, and laws to that effect have been adopted in many of the states."

That the business of auctioneers has always been considered



to be a proper subject for municipal regulation see 3 McQuillin Munic. Corp., § 977; *People v. Grant*, 126 N. Y. 473.

(10.) I think that the occupations covered by the ordinance in question may be said in this day to belong to the class of occupations which from their inherent character give to the authorities of a municipal corporation the power to enact ordinances for their regulation, and that the court should not interfere with the discretion committed to the legislative department of a municipal corporation in such matters except in a very clear case.

(11.) It is held in Virginia that when an ordinance is enacted by a municipal corporation under a specific power conferred upon it by the legislature of the state, the reasonableness of the ordinance is entirely committed to the discretion of the municipality and is not subject to review by the courts. But where the power of the municipal corporation is deduced from general language, then the reasonableness of the ordinance may be made a subject for judicial inquiry: *Danville v. Hatcher*, 101 Va. 523.

I conclude from my examination of the authorities and consideration of the size, condition and business of the community of the City of Richmond, as publicly known, that the city had a right to pass the ordinance in question in the exercise of the general police power conferred upon it. Having that power, the court should not interfere with the ordinance on the ground that its provisions are not reasonable unless they are so manifestly drastic and stringent as to be clearly unreasonable and unfair. While the provisions of the ordinance in question are to some extent stringent, it is not for the court to say whether or not the information possessed by the city council did not lead it to believe that these provisions were essential for the proper regulation of these occupations, and for the protection of the purchasing public in the City of Richmond.

For the above reasons, a preliminary injunction will be refused and the injunction order already entered in one of the cases will be dissolved, but an order will be entered allowing an injunction for a few days and directing that the clerk may deliver the original papers to counsel for the complainants in order that they may forthwith apply to a judge of the Supreme Court of Appeals for an injunction under the provisions of our statute.

#### **Editor's Note.**

In reading this case in reference to the police power of the City of Richmond, one should bear in mind the distinction between the power of the city with reference to local affairs under its Constitution and its power as a branch of the state government under the Constitution of the United States.